APPENDIX B

APPENDIX B: ORDER OF UNITED STATES DISTRICT COURT DATED JUNE 2, 2008

Case No. 01-B-15472 (SMB) 08 Civ. 2553 (GEL)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC.,

Appellant,

-against-

VERIZON NEW YORK, INC.,

Appellee.

GERARD E. LYNCH, District Judge:

ORDER

On November 15, 2007, appellant Best Payphones

filed a notice of appeal from a November 5, 2007, order of Bankruptcy Judge Stuart M. Bernstein. On March 14, 2008, this notice of appeal was docketed in the Southern District of New York. Best was contacted by Court personnel on April 21, 2008, and notified that the appeal had been docketed, but has yet to file its brief. By motion dated April 25, 2008, appellee Verizon New York moves to dismiss Best's appeal. That motion will be granted.

Fed. R. Bankr. P. 8009(a)(1) states that "[t]he appellant shall serve and file a brief within 15 days after entry of appeal on the docket." More than six months have passed since Best filed its initial notice of appeal, more than seventy days have passed since entry of that appeal on this Court's docket, and more than thirty-five days have passed since Best's counsel was reminded of the docketing. Yet to date, Best has not filed an appeal, nor has it formally moved to extend its time to file such an appeal.[1]

Had Best filed a proper motion to extend time, it would nonetheless be denied. In other circumstances, this Court might have been more forgiving. In fact, in other circumstances, this Court has been more forgiving. In a related matter, by order dated November 3, 2005, this Court granted Best's motion to extend time to file its appeal from an order in the same

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[1] By letter dated April 23, 2008, Best requested that the Court "allow the parties until the end of next week to agree on a briefing schedule and submit it to the Court." (Letter of George M. Gilmer, Esq., to the Court, dated April 23, 2008.) However, no such briefing schedule materialized.

underlying bankruptcy matter. (No. 05 Civ. 653 1, Order of November 3, 2005.) The Court noted that Best filed its motion for an extension of time "close to three months after its brief was due," that the conduct of Best's counsel had been "sorely deficient," and that the extension was granted "[w]ith some hesitation." (*Id.*) Best has been reminded by this Court of the clear requirements of Rule 8009(a)(1), and its failure to abide by the rule a second time is neither explicable nor excusable.

Earlier this year, Best retained new counsel, who has represented Best in the underlying Bankruptcy matter at least as of February 3, 2008. In opposing Verizon's motion to dismiss the appeal, Best notes that, by virtue of certain mis-information from the Southern District of New York Bankruptcy Clerk's office, its new counsel did not initially receive notice of the docketing of its appeal. Best argues that the fifteen-day period of Rule 8009(a)(l) is only triggered once the appeal has been docketed and notice of the docketing has been sent to all parties. (Best Reply 3-4.) Even assuming this to be true, the fifteen-day period would have begun to run after Best's new counsel was notified of the docketing of the appeal – which occurred more than a month ago.

Finally, the "long and litigious" history of this proceeding needs to be taken into account. (No. 05 Civ. 653 1, Opinion and Order of March 14, 2006, at 17.) This litigation has been pending for more than five years and, as pointed out by Verizon, Best has repeatedly missed filing deadlines. The present appeal seeks review of the Bankruptcy Court's decision on a

narrow remand for specific factfindings (*id.*), a subject on which the standard of review is narrow and for which the preparation of a brief should not be difficult. In such circumstances, allowing yet more delay has little or no equitable appeal.

The docketing of this appeal, and the corresponding obligation to file a timely brief, can come as no surprise to Best, the party that filed the notice of appeal in the first place. Best has had more than six months to craft its brief and refine its arguments, and has only itself to blame for the failure to file a timely brief. Accordingly, it is hereby ORDERED that Verizon's motion to dismiss Best's appeal is granted.

SO ORDERED.

Dated: New York, New York
June 2, 2008

/s/
GERARD E. LYNCH
United States District Judge

APPENDIX C

APPENDIX C

APPENDIX C: ORDER OF UNITED STATES DISTRICT COURT DATED JULY 21, 2008

Case No. 01-B-15472 (SMB)
08 Civ. 2553 (GEL)

2008 U.S. Dist. LEXIS 108874

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC.,

Appellant,

-against-

VERIZON NEW YORK, INC.,

Appellee.

GERARD E. LYNCH, District Judge:

Appellant Best Payphones asks this Court to recon-

sider its order dated June 2, 2008, granting appellee Verizon New York's motion to dismiss Best's appeal due to Best's failure to comply with Fed. R. Bankr. P. 8009(a)(1), which requires that "[t]he appellant shall serve and file a brief within 15 days after entry of appeal on the docket." Best insists that the fifteen-day period does not begin to run until the appellant receives notice from "the district court clerk." Here, Best admits that its attorney of record "was contacted by the chambers of the Honorable Gerard E. Lynch on Monday April 2 1, 2008," and notified of the docketing of the appeal. (Best's Opposition to Verizon's Motion to Dismiss 2.) However, Best insists that this notice was insufficient, and claims that *Glatzer v. Enron (In re Enron Corp.)*, 475 F.3d 131 (2d Cir. 2007), prevents this Court from dismissing this appeal for failure to comply with Rule 8009.

In *Glatzer*, the district judge dismissed an appeal from an order of the bankruptcy court, viewing "the docketing of [an] appeal alone as sufficient to start Rule 8009's fifteen-day clock running." *Id.* at 132-33. The Second Circuit reversed, concluding that Rule 8009(a)(1) is "only triggered once the appeal has been docketed in the district court *and* notice of the docketing of the appeal has been sent to all parties." *Id.* at 134 (emphasis in original). In contrast to *Glatzer*, this Court did not "premise[ ] its decision to dismiss [Best's] appeal on the view that the docketing of the appeal was itself sufficient to start the fifteen-day clock." *Id.* at 134. Instead, this Court simply held that Best's deadline expired at least fifteen days after "notice [was] sent" to Best by a district court clerk regarding the docketing of the appeal. *Id.* at 134-35.

APPENDIX C

An appellant should not be punished for the mistakes of others outside of its knowledge and control, but this is not such a case. Best had actual notice of the docketing and still failed to file within fifteen days. On Best's theory, even now, more than eight months after Best filed its notice of appeal, more than four months after that appeal was docketed, and three months after receiving actual notice from court personnel, Best's fifteen-day clock still has not even begun. Rule 1001 of the Federal Rules of Bankruptcy Procedure instructs the Court to construe and administer those rules "to secure the just, speedy, and inexpensive determination of every case and proceeding." *Glatzer* does not mandate an interpretation of Rule 8009 as a rigid and unflexible [*sic*] as Best proposes. Best has only itself to blame for its failure to file a timely brief, and a contrary ruling would only reward Best for its dilatory tactics.

The Court has considered Best's other arguments, and they are without merit.

Accordingly, it is hereby ORDERED that Best's motion for reconsideration is denied.

SO ORDERED.

Dated: New York, New York
July 21, 2008

/s/
GERARD E. LYNCH
United States District Judge

APPENDIX D

APPENDIX D

APPENDIX D: ORDER OF THE SECOND CIRCUIT DATED JULY 31, 2009

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 31st day of July, two thousand and nine,

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IN RE: BEST PAYPHONES, INC.,

Debtor.

BEST PAYPHONES, INC,

Appellant,

-v.-

VERIZON NEW YORK INC.,

Appellee.

ORDER

APPENDIX D

Docket Number: 08-4046-bk

[FILED JULY 31, 2009]

Best Payphones, Inc., having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

For the Court:

Catherine O'Hagan Wolfe, Clerk

By: /s/
Frank Perez, Deputy Clerk

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